MOHD HANAFI RAMLY A

v.

PP

HIGH COURT SABAH & SARAWAK, BINTULU B
JOHN KO WAI SENG JC
[CRIMINAL APPEAL NO: BTU-41A-1-2011]
19 MAY 2011

CRIMINAL PROCEDURE: *Charge - Duplicity of - Whether duplicity of offences nullified trial - Whether offences of same kind and triable together made duplicity curable - Whether accused prejudiced - Whether proximity of time and place and unity of purpose in offences permitted their joint trial - Whether sentence of lower court adequate - Criminal Procedure Code, ss. 163, 164, 165 & 422 - Evidence Act 1950, ss. 8 & 157* C D

The appellant, a school teacher, was found guilty by the Sessions Court on three charges of committing sexual offences against one of his pupils, a 10-year-old girl. On the first charge of kissing her on the mouth and sucking her breasts, the appellant was sentenced to three years' jail. On the second charge of committing carnal intercourse against the order of nature, namely, asking her to perform fellatio, the appellant was sentenced to five years' jail and three strokes of whipping. On the third charge of insulting the girl's modesty by asking her to strip naked and taking a photograph of her in the nude, the appellant was sentenced to a year's jail. Hence, the appellant appealed to the High Court against his conviction and sentence. E F

The first and third charges stated that the offences were committed about 7pm on 13 May 2009 and 14 May 2009 at the KH Room in the school while the second charge stated that the offence was committed at the same place and time as the other two charges, but on 20 May 2009. The appellant argued, *inter alia,* that (i) the first and third charges were illegal for containing duplicity or multiplicity of offences thus rendering the trial a nullity (ii) the three charges comprised more than three offences of the same kind and the trying of all of them at one trial violated s. 164(1) of the Criminal Procedure Code ('CPC') (iii) there was lack of independent corroboration that he had committed the offences and (iv) the sentences were manifestly excessive. G H I

Held (dismissing the appeal against conviction and sentence):

(1) The two offences cited in the first and third charges by virtue of the dual dates of commission created separate offences and should each have been the subject of a separate charge. This duplicity could be struck down by s. 163 CPC and the case of *Jagar Singh v. PP* as an illegality. However, as the offences were of the same kind and could be tried together as per s. 164 CPC, such duplicity was an irregularity curable under s. 422 CPC provided there was no failure of justice. (paras 32, 33 & 34)

(2) Nothing in the notes of proceedings showed that the appellant was ever prejudiced or confused by the way the first and third charges had been framed. There was no miscarriage of justice from the duplicity in the two charges as each clearly stated the offence committed and the two different dates of their commission. (para 38)

(3) Even though there were more than three distinct offences tried in one trial, their proximity and unity of purpose made them all part and parcel of the same transaction of exploiting the innocence of the victim to satisfy the perverted lust of the appellant over a short period of time. The test of s. 165 CPC of being within "the same transaction" had been satisfied to allow for all five offences in the three charges to be tried in one trial. (para 55)

(4) The sessions judge had not erred in accepting the sworn evidence of the victim's classmate witnesses to independently corroborate the victim's sworn evidence. This, added to the other independent corroboration from the evidence on the complaint of PW6, PW7 and PW10 which boosted the weight of the corroborative evidence for the judge to find that the defence had failed to raise a reasonable doubt on the prosecution's case. (para 103)

(5) There was no error of law or facts, or that a wrong principle had been applied or omitted or that the sentence was manifestly excessive to justify interference with the sentence of the Sessions Court. The prevalence of such teacher/student outraging and molestation cases justified an even harsher sentence. (para 121)

Case(s) referred to:
Amrita Lal Harza & Ors v. Emperor 42 Cal 957: AIR (1933) Cal 308 ***(refd)***
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Balwant Singh v. PP [1960] 1 LNS 10 HC ***(refd)***
Cheong Sik Kwan v. PP [1959] 1 LNS 14 HC ***(refd)***
Chia Kim Heng Frederick v. PP [1992] 1 SLR 361 ***(refd)***
Chin Choy v. PP [1955] 1 LNS 17 ***(refd)***
Chiu Nang Hong v. PP [1964] 1 LNS 24 PC ***(refd)***
Datuk Hj Wasli Mohd Said v. PP & Another Case [2006] 6 CLJ 1 HC ***(refd)***
Din v. PP [1964] 1 LNS 33 FC ***(refd)***
Haji Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 ***(refd)***
Jagar Singh v. PP [1936] 1 LNS 25 HC ***(refd)***
Lee Chin Kee v. PP [1935] 1 LNS 29 HC ***(refd)***
Lee Teck Hock v. PP [1972] 1 LNS 70 HC ***(refd)***
Lim Chuan Huat & Anor v. PP [2002] 1 SLR 105 ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Mohd Yusof Rahmat v. PP [2009] 2 CLJ 673 CA ***(refd)***
Ong Lai Kim & Ors v. PP [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mardai [1949] 1 LNS 65 HC ***(refd)***
PP v. Tanga Muthu [1939] FMSLR 166 ***(refd)***
R v. George Thomas Johnson [1945] 2 All ER 105 ***(refd)***
See Yew Poo v. PP [1948] 1 LNS 62 HC ***(refd)***
Shaafie Saibi v. PP [2009] 3 CLJ 364 CA ***(refd)***
Tan Teik Leong v. Reg [1955] 1 LNS 157 ***(refd)***
Tajudin Salleh v. PP [2008] 2 CLJ 745 ***(refd)***
The King v. Surrey Justices [1932] 1 KB 450 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 163, 164(1), 165(1), 422
Evidence Act 1950, ss. 8, 133A, 114(g), 157
Motor Vehicles Enactment, s. 46(i)
Motor Vehicles (Commercial Use) Regulations, reg. 3(5A)
Penal Code, ss. 321, 354, 377B, 509

Indian Code of Criminal Procedure [Ind], s. 218(1)

Other source(s) referred to:
Mallal's Criminal Procedure, 5th edn, p 2863
The Code of Criminal Procedure: Ratanlal and Dhirajlal, 17th edn, p 452

For the appellant - David Kuok; M/s Wong Orlando Chua & Kuok Advocates
For the PP - Hairun Najmi Mashahadi DPP

Reported by Ashok Kumar

JUDGMENT

John Ko Wai Seng JC:

Charges And Sentence

[1] The appellant was charged as follows:

In the 1st charge under s. 354 of the Penal Code ("1st charge"):

> Bahawa kamu pada 13/5/2009 dan 14/5/2009, jam lebih kurang 7.00 malam di Bilik ..., Sekolah ..., di dalam Daerah Bintulu di dalam Negeri Sarawak telah mencabul M (P), 10 Tahun, Surat Beranak No. ... dengan mencium mulut dan menghisap payudara mangsa. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 354 Kanun Keseksaan.

(Loosely translated in English:

> That you on 13/05/2009 and 1 14/5/2009 at about 7pm Bilik ..., Sekolah ..., Bintulu in the State of Sarawak had assaulted (outrage) M (F), 10 years old, Birth Certificate No ... by kissing her mouth and sucking her breast. Thereby you had committed an offence under s. 354 of Penal Code.

[2] In the 2nd amended charge under s. 377B of the Penal Code ("2nd charge"):

> Bahawa kamu pada 20/5/2009, jam lebih kurang 7.00 malam di Bilik ..., Sekolah ..., di dalam Daerah Bintulu di dalam Negeri Sarawak telah melakukan persetubuhan yang bertentangan dengan aturan tabii ke atas M (P), 10 Tahun, Surat Beranak No. dengan menyuruh mangsa menghisap kemaluan kamu. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 377B Kanun Keseksaan.

(Loosely translated in English:

> That you on 20/05/2009 at about 7 pm at Bilik ... Sekolah ... Bintulu of the State of Sarawak had committed carnal intercourse against the order of nature with M (F) 10 years old, Bintulu Certificate No .... by asking her to suck your private part. Thereby you had committed an offence under section 377B of Penal Code.

[3] In the 3rd charge under s. 509 of the Penal Code:

> Bahawa kamu pada 3/5/2009 dan 14/5/2009, jam lebih kurang 7.00 malam di Bilik ..., Sekolah di dalam Daerah Bintulu di dalam Negeri Sarawak telah mengaibkan kehormatan M, (P), 10 Tahun, Surat Beranak No. kerana menyuruh mangsa menanggalkan pakaian dan mengambil gambar mangsa dalam keadaan bogel. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 509 Kanun Keseksaan.

(Loosely translated in English:

> That you on 13/05/2009 and 14/5/2009 at about 7 p.m. at Bilik ... Sekolah ... Bintulu in the State of Sarawak had insulted the modesty of M (F), 10 years old, Birth Certificate No. ... by asking her to take off her clothing and taking her nude photograph. Thereby you had committed an offence under section 509 of Penal Code.

[4] The appellant was found guilty and convicted by the learned Sessions Judge on all three charges:

(i) For the 1st charge under s. 354 of the Penal Code (Code) he was sentenced to three years imprisonment;

(ii) For the 2nd charge under s. 377B of the Code he was sentenced 19 to 5 years imprisonment and 3 strokes of whipping. The five years imprisonment is to run consecutively after the imprisonment sentence of the 1st and 3rd Charges; and

(iii) For the 3rd charge under s. 509 of the Code he was sentenced to one year imprisonment and the said one year imprisonment is to run concurrently with the three years imprisonment sentence of the 1st charge.

[5] The appellant being dissatisfied with the decision on all three charges of the learned Sessions Judge appeals against both conviction and sentence.

Grounds Of Appeal Against Conviction

Duplicity Or Multiplicity: 1st And 3rd Charges

Framing Of 1st And 3rd Charges

[6] Learned counsel for the appellant submitted that the 1st and 3rd charges preferred against the appellant are illegal and bad in law for duplicity or multiplicity rendering the trial a nullity. The learned counsel for the appellant submitted that the defence is

A embarrassed and very confused as to the offences in the 1st and 3rd charges preferred against the appellant in the following manner:

1st Charge

B Learned counsel for the appellant contends that under the 1st charge, the appellant was charged for two separate and distinct offences:

(i) assault or use of criminal force to M (the victim) with intent C to outrage her modesty on 13 May 2009; and

(ii) assault or use of criminal force to the victim with intent to outrage her modesty on 14 May 2009.

3rd Charge

D

Learned counsel for the appellant contends that under the 3rd charge, the appellant was charged for four separate and distinct offences:

E (i) intending to insult the modesty of the victim on 13 May 2009 by ordering her to take off her clothes;

(ii) intending to insult the modesty of the victim on 14 May 2009 by ordering her to take off her clothes;

F (iii) intending to insult the modesty of the victim on 13 May 2009 by taking her nude photograph; and

(iv) intending to insult the modesty of the victim on 14 May 2009 by taking her nude photograph.

G

[7] Learned DPP submitted that there was no irregularity in the way the charges had been framed and even if the 1st and 3rd charges as framed are defective for duplicity the irregularity is curable under s. 422 of Criminal Procedure Code ("CPC").

H *Requirements Of The Law In Framing A Charge*

(i) Distinct Offences Created By A Law In Separate Charges

Learned counsel for the appellant cited *Jagar Singh v. PP* [1936] I 1 LNS 25, where the appellant therein was convicted on the following charge:

> That you at 6.45pm on 5-11-35 at Tanjong Malim did drive your car carelessly without reasonable regard to the safety comfort or convenience of other persons using the road thereby resulting in a collision of your car to wit with the Police loadometer an offence under section 46(i), Motor Vehicles Enactment (Cap. 168).

It was contended for the appellant that the charge as framed that he had drove his car (i) carelessly and (ii) without reasonable regard to the safety comfort or convenience of other persons using the road contrary to s. 46(i) of the Motor Vehicles Enactment, (Cap 168) comprises two separate offence because the section reads:

> 46(i) A person who drives a motor vehicle on any road carelessly **or** without reasonable regards to the safety comfort or convenience of other persons using the road shall be punished with a fine which may extend to one hundred dollars. (emphasis added)

His Lordship Howes J had held at p. 93 *(ibid)*:

> Upon reading section 46(i) of the Motor 1 Vehicles Enactment, I am satisfied that it contemplates two distinct offences: (1) driving carelessly; (2) driving without reasonable consideration.

At p. 94 *(ibid)*, his Lordship further held that:

> ... the trial of the accused for the two distinct offences contemplated in section 46(i) of the Motor Vehicle Enactment (Cap. 168) in one charge was not a mere irregularity, but was an illegality, and for this reason the conviction must be quashed, and the fine repaid to the defendant.

(*Lee Teck Hock v. PP* [1972] 1 LNS 70 also followed the *Jagar Singh* case *(supra)*).

This is in line with s. 163 CPC which states:

> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 16 and 170.

(ii) Two Offending Acts In One Charge

In *Mallal's Criminal Procedure* (5th edn, p. 2863) states that s. 163 CPC provided for two general rules:

A Firstly, the section requires that for every 1 distinct offence there has to be a separate charge. *This first rule embodies the rule against duplicity which is a prohibition against the lumping or incorporating of more than one offence in a single charge. The object of this rule is to give the accused notice of the precise accusation in writing which he has to face at the trial. For instance if one charge states two offences, he cannot know for which of the two offences he is to be prosecuted. The risk of confusion of issues may also embarrass the accused in his defence. Furthermore, the accused may be prevented on a future occasion from pleading autrefois convict. The second general rule requires that every charge be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170 of the CPC. This general rule incorporates the rule against misjoinder of charges. The underlying idea behind this rule is that if too many charges are grouped together against an accused person, he might be handicapped or embarrassed in conducting his defence …* (emphasis added)

[8] *1st Charge: Components*

In our present case, for the 1st charge, the respondent was charged under s. 354 of the Code which reads as follows:

> Whoever assault or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to ten years, or with fine, or with whipping, or with any two of such punishments.

[9] Learned counsel for the appellant contends that the appellant was charged under the 1st charge for assault or criminal force to the victim on two separate occasions ie, 13 May 2009 and 14 May 2009 in a single charge. The learned DPP had submitted that the 1st charge laid down two offences both under s. 354 of the Code against the appellant, the duplicity arises in regard to the time of the commission of the offence on 13 May 2009 and 14 May 2009.

[10] Section 354 of Code appears to create two offences, one of "assault" and the other to "use of criminal force to any person" for outraging modesty. However, in our present case, the word "mencabul" in the charge is a word in Malay which means to molest; or outrage; or pester in a hostile way or so to cause injury. It may either mean "mencabul" by way of assault or criminal force or it may be both. After reading the 1st charge in relation to the act of "mencium dan menghisap" (kissing and sucking), this court

is of the opinion that the 1st charge is for the act of outraging modesty obtained by means of criminal force (touching of some sort) and not by way of assault (threat of injury) which both also connotes that there was no consent from the victim.

[11] On the issue of dates of commission of the offence under the 1st charge as creating two distinct offences ie, 13 May 2009 and 14 May 2009, this appears to fall within the prohibition of s. 163 of CPC and the authority cited supports learned counsel for the appellant's contention that it is bad being irregular to lump two distinct offences committed on the dates into one charge.

[12] *3rd Charge: Components*

The appellant was charged in the 3rd charge under s. 509 of the Code which reads as follows:

> Whoever, intending to insult the modesty of any person, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years, or with fine, or with both.

[13] Learned counsel for the appellant submitted that, in respect of the 3rd charge the appellant was charged for four distinct offences ie, ordering PW5 to take off her clothes with intend to insult her modesty on two separate occasions ie, 13 May 2009 and 14 May 2009 and taking nude photograph of the victim with intend to insult her modesty on two separate occasions ie, 13 May 2009 and 14 May 2009.

[14] On the other hand, the learned DPP submitted that though the 3rd charge laid down two offences both under s. 509 of the Code, the duplicity arises because of the time of the commission of the offence on 13 May 2009 and 14 May 2009.

[15] Again, in relation to s. 163 of CPC the court has to consider the whole intention of the 3rd charge in regard to s. 509 of the Code. Under the 3rd charge, the appellant was charged for (i) intending to insult the modesty of the victim on 13 May 2009 by ordering her to take off her clothes and by

taking her nude pictures, and (ii) intending to insult the modesty of the victim on 14 May 2009 by ordering her to take off her clothes and by taking her nude pictures.

[16] Reference is made to *The Code of Criminal Procedure: Ratanlal and Dhirajlal* (17th edn) at p. 452 on s. 218(1) Indian Code of Criminal Procedure which is the similar as our s. 163 CPC. At p. 453 the learned authors take this view:

> 1. **'For every distinct offence of which any person is accused'.** – The expression "every distinct offence" must have a different context from the expression 'every offence' or 'each offence'. A separate charge is required for every distinct offence and not necessarily for each separate offence. 'Distinct' means 'not identical'. It stresses characteristics that distinguish, while the word 'separate' would stress the 'two things not being the same'. Two offences would be distinct if they be not in any way inter-related"

[17] The court is of the view following the learned authors, Ratanlal and Dhirajlal that there is only one offence in this 3rd charge occurring on 14 May 2009 because "ordering her to take off her clothes and by taking her nude pictures are all so interconnected as to constitute one act under the same transaction and as one incident does not create distinct offences. If the taking of the clothes did not happen then the event of taking nude pictures to insult the modesty would not have happened.

[18] If we relate this to the 1st charge, there the appellant had committed two acts namely: "mencium dan menghisap" (kissing and sucking) in the course of outraging the victim. Again these are all acts committed in one incident and same transaction for which the appellant had not made an issue of as part of this appeal. Similarly, in a s. 354 charge of "groping and caressing" a victim will fall to be considered as one transaction if it was done one after the other or intermixed in the same incident and should not be construed as two acts to be separately charged.

[19] Another example of this one transaction would be: "B was charged under s. 321 of Code for voluntarily causing grievous hurt by kicking and punching one C". In such a case, a court would be correct to consider the kicking and punching as one act as it falls under one transaction and not creating two separate offences.

Unless if the kicking happens first and the punching happens much later or on another day, then that can be considered to constitute as two distinct offences to be treated as such.

[20] This is like what happened in the case of *Haji Abdul Ghani Ishak & Anor v. PP* [1981] 1 LNS 96, where the appellant was charged for:

> ... committed corrupt practice in that you while being such a member used your office, for your pecuniary advantage, namely participated in me deliberation for approving an application for State Land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, prepared by one Mohd. Noor bin Baba and submitted in the name of one Kipah binti Othman on 2nd March, 1974 and in respect of such land in which you were engaged in business you did take part in a decision likely to affect your pecuniary interest therein ...

[21] His Majesty, Raja Azlan Shah CJ (Malaya) (as he then was) in holding that the particularisation of the facts did not create duplicity of charge observed:

> In *R v. George Thomas Johnson* [1945] 2 All ER 105 the appellant was convicted under the Prevention of Crimes Act, 1871, section 7, with being "... found in certain public places, namely, Elm Tree Road and Circus Road ... waiting for an opportunity to commit an offence ...
>
> The two roads named adjoined one another. On appeal it was contended *inter alia* that the indictment was bad for duplicity in that it was alleged in one count the appellant had committed two offences, one in Elm Tree Road and the other in Circus Road. It was held by the Court of Criminal Appeal that the form of the indictment did not in the circumstances prejudice or cause embarrassment to the defence and therefore the indictment was not bad for duplicity. In our view it is clear in the amended charge that there is only one offence of committing corrupt practice and that the rest of the charge merely deals with particularizations. It was the unfortunate use of language in the amended charge by the learned judge which brought about the misconception that there was duplicity in the charge. The charge carries only the offence of corrupt practice alleged against the 1st appellant, ie, while being a Member of the administration he used his office for his pecuniary or other advantage. That was the charge known to the 1st appellant. It cannot be said that he did not understand it. There is strong reason for thinking, and no reason for denying, that he was not in any way prejudiced. We are satisfied that the

A particularizations in the charge could not have embarrassed or prejudiced the 1st appellant, although with respect, his use of familiar expressions in relation to that topic might have led to the opposite conclusion. We are also satisfied that the technical irregularity did not cause a miscarriage of justice – see also *Jack Dennis McVitie* [1960] 44 Cr AR 201, the objection on the ground
B of duplicity must therefore fail.

[22] Thus, in the court's opinion the act "ordering her to take off her clothes and by taking her nude pictures" is particularising the charge which should be read as part and parcel of one
C incident and not meant to be split into two acts for creating two distinct offences. Similar as being present "in Elm Tree Road and Circus Road" not constituting separate offending acts to be charged separately *(R v. George Thomas Johnson (supra))*. Even if the 3rd charge as framed is bad, the appellant had not shown that
D it has created a miscarriage of justice and it is a defect that is curable under s. 422 of our CPC as elaborated below in respect of the duality from the dates charged.

[23] There is as such no multiplicity of charges in the 3rd charge
E as framed in respect of the act of "ordering her to take off her clothes and by taking her nude pictures", if at its best there may be duplicity in being charged under a charge for two offences under s. 509 of the Code committed on different dates, namely 13 May 2009 and 14 May 2009 like the 1st charge.

F *(iii) Two Different Dates In One Charge*

[24] It is ascertained that the appellant has been charged with two offences committed on different dates, namely 13 May 2009 and 14 May 2009 in respect of the 1st and 3rd charge (and in
G the event under the 3rd charge, the "ordering her to take off her clothes and by taking her nude pictures" does constitute two offences under s. 509 of the Code). Based on *Jagar Singh*'s case *(supra)* the appellant submits that this duplicity will be an illegality as to allow the appellant to succeed in his appeal.

H **[25]** In the earlier case of *Lee Chin Kee v. Public Prosecutor* [1935] 1 LNS 29 it was held that duplicity of charges is an irregularity and not an illegality that can be cured under s. 419 of the Criminal Procedure Code 1926 provided such irregularity has
I occasioned no failure of justice based on this citation:

> In *Sohoni's Code of Criminal Procedure*, 12th edition 1927, page 1145 in the notes to Section 537 of the Indian Code of Criminal Procedure corresponding to Section 419 here, I find the following note. – "when the defect is one of duplicity and not misjoinder this section may be applied." A reference is made to the notes at page 565 of the same work, and the cases there collected would seem to bear out the statement which I have already cited. In other words duplicity is an irregularity and not an illegality; it may therefore be cured under section 419. I am satisfied that in the present appeal the irregularity in question has occasioned no failure of justice."

[26] Section 419 of the Criminal Procedure Code 1926 (which is in *pari materia* with s. 422 CPC) provides that:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint ... unless that error, omission ... irregularity ... had occasioned a failure of justice.

[27] This curing under s. 422 CPC is accepted by the latter case of *See Yew Poo v. Public Prosecutor* [1948] 1 LNS 62 where the court had held on issue of duplicity:

> We are therefore of the opinion that, as in the present case each of the offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity was merely an irregularity which can be cured under the provision of Section 422 provided that the accused was not prejudiced and there was no failure of justice occasioned by the irregularity.

[28] However in the *See Yew Poo*'s case *(supra)* the court did find that the framing of the charge for robbing two persons "between 7 to 8pm" in the case had caused confusion in the mind of the learned judge and therefore the court found that there was the possibility of a failure of justice and allowed the appeal.

[29] In the Singapore case of *Lim Chuan Huat & Anor v. Public Prosecutor* [2002] 1 SLR 105, where the charge reads as follows:

> That you, Lim Chuan Huat, M/42 years, are charged that you on various occasions between the 5th day of March 1999 to the 11th day of June 1999, at Blk 295 Choa Chu Kang Avenue 2 # 12-159, Singapore, did voluntarily cause hurt to one Suprapti, F/27 years, to wit, by hitting her back, shoulders and hands with your hands and a rattan cane, and you have thereby committed

A an offence punishable under Section 323 of the Penal Code, Chapter 224, read with Section 73(2) of the Penal Code Chapter 224.

[30] On appeal the charge was challenged for duplicity and the Singapore court had held that:

B

> A charge alleging that the accused committed two or more distinct offences is duplicitous and contravenes s. 168 of the Criminal Procedure Code (Cap 68) ('CPC'). The exceptions referred to in s. 168 are confined to the rule on joinder of charges and do not
> C apply to duplicity. *However, where each of these offences could have been the subject of a separate charge, and could have been proceeded with at one trial, the duplicity is merely an irregularity which can be cured by s. 396 of the CPC.* This is provided the accused was not prejudiced in his defence and there was no failure of justice occasioned by the irregularity. Hence, notwithstanding that the court found the
> D appellants' individual charge to be bad for duplicity, *the court was satisfied that on the present facts, the duplicity in question had occasioned no failure of justice nor prejudiced the appellants in their defence. In other words, the duplicity amounted to an irregularity which could be cured by s. 396;* (*See Yew Poo v. PP* [1949] MLJ 131,
> E *Ramachandran v. PP* [1972-1974] SLR 383, [1972] 2 MLJ 183 and *Chuan Hoe Engineering v. PP* [1996] 3 SLR 544 followed.) (emphasis added) (Sections 168 and 396 of the Singapore Criminal Procedure Code are in *pari materia* with Sections 163 and 422 of our CPC.)

F **[31]** From the above authorities cited of the cases of *See Yew Poo* and *Lim Chuan Huat (supra)*, the principle evolves that in the event of duplicity in a charge it is an illegality because of s. 163 CPC thereby recognising *Jagar Singh*'s case *(supra)* but the charge can be treated as an irregularity curable by s. 422 CPC if
G the two or more distinct offences in the same charge even though duplicitous can be jointly tried unless such treatment can be shown to have occasioned a failure of justice (see the cases of *Jagar Singh (supra)*; *See Yew Poo (supra)* and *The King v. Surrey Justices* [1932] 1 KB 450).

H

[32] In short, if a charge contains more than one offence which should have been subject of separate charges, if it can nevertheless be proceeded on in one trial, then such duplicity in the charge is an irregularity curable under s. 422 CPC provided
I there is no failure of justice. This will definitely apply to regularise the 3rd charge if there are four offences being charged as contended by learned counsel for the appellant.

[33] It is clear that the two offences cited in the 1st and the 3rd charges by virtue of the dual dates of committal created separate offences though of the same kind albeit committed on a different date which should each be the subject of a separate charge. This duplicity can lead to the 1st and 3rd charge being struck down by s. 163 CPC and *Jagar Singh*'s case *(supra)* as an illegality.

[34] However applying the principle in the cases of *See Yew Poo* and *Lim Chuan Huat (supra)* to the 1st and 3rd charges, the dual dates of committal for the same kind of offence committed in the 1st charge for s. 354 of the Code and also the 3rd charge for s. 509 of the Code means that the two offences in them can be tried respectively together and also according to s. 164(1) of the CPC being of the same kind. This is a different issue of trying the 1st and 3rd charge together which will be considered in relation with the joinder of trial with the 2nd charge.

[35] Section 164(1) of CPC reads:

> (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial for any number of them not exceeding three.
>
> (2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Penal Code, or of any other law for the time being in force:

[36] Section 164(1) of CPC allows a person who is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, to be charged with and tried for not more than three offences together.

[37] The court agrees with the submission of learned DPP that in regard to the 1st charge it can be proceeded with in one trial as it involves the same kind of offence, same accused, same victim, same place except for the proximity of time being the next day under s. 164(1) CPC. The same also applies to the 3rd charge. Therefore the duplicity of the 1st charge and 3rd charge if an irregularity is curable under s. 422 of CPC according to the authorities of the cases of *See Yew Poo* and *Lim Chuan Huat (supra)*.

[38] The court further agrees with the learned DPP that the nothing from the Notes of proceeding shows that the appellant was ever prejudiced or confused by the way the 1st and 3rd charges had been framed since the two distinct dates are stated in respect of when the offence was committed or that there are four offences in the 3rd charge. There is no danger of confusion or embarrassment caused to the defence on the facts of this case by the duplicity. Even though the learned counsel for the appellant submits that the appellant's defence has been embarrassed there is no proof that this is the case. The court considers and finds that there is no miscarriage of justice from the duplicity of the 1st and 3rd charge as each of the charge clearly stated the offence committed and the two different dates of the commission of the offences under the 1st and 3rd charges *viz.* 13 May 2009 and 14 May 2009. The same consideration also applies if there are four offences charged in the 3rd charge. The issue of the lumping of the 1st and 3rd charge in one trial under s. 165 of the CPC will now be dealt with under the appeal with their joinder of trail with the 2nd charge.

Joinder: Five Offences Joined In One Trial (s. 164(1) CPC)

[39] In the present case, learned counsel for the appellant had submitted that the 1st and 3rd charges are bad for duplicity as having six offences to which the court had found that they constitute in total four offences, the learned counsel for appellant further submitted that the Sessions Court had by trying the 1st, 2nd and 3rd charges comprising in total of five offences in one trial is a clear violation of s. 164(1) of the CPC which disallows more than three offences of the same kind to be joined in one trial.

[40] This was the objection taken in the case of *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374, where the accused was charged with four separate acts of rape that took place over a period of five years and he was tried in one trial for the four similar offences. The Court of Appeal ruled that the consequence for violating s. 164(1) of the CPC was that the trial was a nullity. The joinder was not a mere irregularity but an incurable illegality.

[41] Learned DPP submitted that even if there are more than three offences in the 1st, 2nd and 3rd charge jointly tried in single trial, all the five offences can be tried together as being a series of acts so connected together as to form the same transaction which

will not prejudice the appellant under s. 165 CPC. Citing the case of *Tan Teik Leong v. Reg* [1955] 1 LNS 157, the appellant in this case was charged with a total of six charges. Three of these were charges under reg. 3(5A) of the Motor Vehicles (Commercial Use) Regulations of causing to be let out on hire a motor vehicle which was not an authorised vehicle.

[42] The court held that (1) there was nothing illegal in the joinder of the six charges as the various sections of the Criminal Procedure Code permitting joinder of charges are not mutually exclusive but cumulative; (2) the appellant was not in any way prejudiced in this case by the joinder of the charges.

[43] Section 165 of CPC state:

> (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.
>
> (2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for each of those offences.
>
> (3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by those acts when combined, or for any offence constituted by any one or more of those acts.

[44] For our present case, undeniable that there were more than three (3) charges against the appellant ie, i) two charges under s. 354 of the Code ii) one charge under s. 377B of the Code, and iii) two charges under s. 509 of the Code. The chronology to support the 1st to 3rd charges according to the evidence in particular of the victim (PW5) adduced at the trial took place between the dates 13 May 2009 to 20 May 2009.

[45] Section 165 of the CPC can only be invoked if the following necessary requirements are fulfilled:

A – there is only one accused, ie, the appellant;

– more than one offence is committed ie, five in total; and

– the offences are committed by a series of acts so connected to form the same transaction ie, the chronology of the
B offending acts of molesting the person and privacy of the victim by the appellant all took place in a space of about eight days at the KH Room.

[46] In *Amrita Lal Harza & Ors v. Emperor* 42 Cal 957: AIR
C (1933) Cal 308, the court observed that it is impossible to frame a comprehensive formula of universal application to interpret the idea of same transaction. It was held that the factors to consider whether two or more acts form the same transaction are:

D – proximity of time

– unity or proximity of place

– continuity of action and

E – community of purpose or design

[47] The "same transaction" test enunciated in *Amrita Lal Harza case (supra)* was adopted in the case *Chin Choy v. PP* [1955] 1 LNS 17.

F **[48]** In the case of *Cheong Sik Kwan v. Public Prosecutor* [1959] 1 LNS 14 Thomson CJ where stated at p. 192 D:

> The question of when a number of acts do or do not form the same transaction for the purposes of sections 235 and 239 of the
G Indian Criminal Procedure Code (our sections 165 and 170) has been considered by the Courts in India … apart from insisting on the presence of such elements as proximity of time and place continuity of action and unity of purpose and design, they are all agreed that the question is a question of fact to be decided upon the circumstances of each individual case.

H

[49] Coming to the facts of our present case, the appellant is the only person and the victim is also the same person for all the five offending acts charged at the KH Room. It is undeniable that the appellant had committed more than one offence. The proximity of
I time is very close as the offences were committed on 13 May 2009, 14 May 2009 and 20 May 2009. Though the appellant was charged for different distinct offences but the court is of the

opinion that the acts committed form part of one transaction ie, to satisfy the perverted lust of a lecherous appellant through molestation of the body and person of the victim by kisses, naked photography and finally inducing fellatio during that eight days period. There is also continuity of action and unity of purpose and design to constitute one transaction here. This can be seen by the "warming up" or "testing" done by the appellant through the initial molestation and photo-taking sessions. Seeing no reaction from the victim this had emboldened the appellant to induce the subdued victim to perform the act of fellatio.

[50] Learned counsel for the appellant cited the case of *Shaafie Saibi v. PP* [2009] 3 CLJ 364 where the Court of Appeal was of the view that rape is not a continuing offence but a single act of unlawful sexual intercourse and held that an offence of rape cannot be committed from 1 October 1992 to 31 October 1992, as alluded to in the 1st charge, nor can such an offence be committed between 1 January 1992 till 31 December 1995, as stated in the 2nd charge. In that case, the offence in the 1st charge clearly overlapped the offence in the 2nd charge. The charge as framed was found to prejudice the accused to a fair trial by not allowing him to legitimately raise a defence of alibi and was deemed defective.

[51] The Court of Appeal also found that the two alleged offences by the appellant were distinct offences and were correctly preferred as required by law. However it held that the two charges could not be tried together in one trial without sanction by law under s. 165(1) of the CPC or s. 164 CPC as they were not committed within the space of 12 months being not of the same transaction as a rape is a single act and the joinder was found to be an illegality.

[52] With greatest respect to learned counsel for the appellant, the court cannot see the applicability of *Shaafie Saibi*'s case to further the appeal case of the appellant as it is correctly decided on its facts. The appellant here has been charged for each distinct offence in total five, there is no general charge leveled at him of committing any of the offending acts between the "13 to 20 May 2009" as happened in the *Shaafie Saibi* case. The five distinct charges are part of the same transaction because of proximity which is distinguishable from *Shaafie Saibi*'s case *(supra)* where it

occurred between 1992 and 1995 which is more than a year and as such takes it out from being construed as in the same transaction as contemplated under s. 165(1) CPC and totally outside s. 164(1) CPC.

[53] The other overriding factor of public policy that needs to be taken into consideration by the court in allowing such joinder of the 1st and 3rd charges for multiple offences committed on her over a short period of time is the age of the victim herself. The court considers that since it is a minor upon whom the perverse offences had been visited on, it is not in the interests of public policy and justice to subject her and the other witnesses who are minors to attend at multiple trials. There can be no doubt at all that to require the victim, a minor and also the other young witnesses involved to attend more than once in court to testify on her terrible experience in the hands of the appellant would be a mentally and emotionally stressful exercise that would be highly undesirable and totally unacceptable.

[54] This factor alone should be able to vitiate the principle (see *Datuk Haji Wasli bin Mohd. Said v. PP & Another Case* [2006] 6 CLJ 1) that the court should lean in favour of the accused against a joint trial where there is a doubt and any apparent injustice that may be visited upon the appellant for the joinder of the 1st to 3rd charges in one trial here.

[55] Thus after considering both sides' submissions and the relevant law, it is the court's opinion that even though there were more than three distinct offences tried in one trial in the present case but because of their proximity and unity of purpose makes them all to be part and parcel of the same transaction of exploiting the innocence of the victim to satisfy the perverted lust of the appellant over a short period of time. The test of s. 165 CPC of being within the same transaction has been satisfied to allow for all five offences in the 1st to 3rd charges to be tried in one trial.

No Evidence And Non Consideration Of Countering Evidence (Ground 2(a) Of Petition)

Victim (PW5) Evidence: 2nd Charge

[56] Learned counsel for the appellant submitted that the victim (PW5) in giving her testimony did not testify at all during the trial that the appellant committed carnal intercourse against the order of nature by introducing his private part into her mouth on 20 May 2009, the date specified in the 2nd charge.

[57] The learned DPP submitted that here is sufficient evidence by the victim to implicate the appellant with the offence of carnal intercourse on 20 May 2009.

[58] A reading of the evidence of the victim (PW5) in relation to the finding of the learned Sessions Judge shows:

> According to the victim (PW5) on 20 May 2009 at KH Room during night classes the appellant asked the victim to take off her clothes and he kisses lips (line 3 p. 51 ROA) and sucks her nipples (line 8 p. 48 ROA).

[59] The appellant takes off pants and asks the victim to suck his private part (lines 3-11 p. 47 ROA and at lines 1-16 and 9-12 p. 48 ROA).

[60] Based on this the learned Sessions Judge (from pp. 169-170 ROA in particular) and the corroborating evidence from PW8, PW9 and PW10 of the fact that the victim (PW5) was asked by appellant to go to the RH Room and other evidence of complaint were sufficient proof to convict the appellant of the 2nd charge.

[61] The learned Sessions Judge can conclude as he did that PW5 and PW8 had mixed up the dates (at lines 6-17 at p. 169 and lines 8-9 at p. 7-8) when PW5 thought that the offending act for the 2nd charge took place on 13 May 2009 at (lines 6-15 at p. 34 ROA) instead of 20 May 2009. PW5 later gave evidence that it took place on 20 May 2009 and insisted that there was only one such offending act (at lines 9-12 at p. 48). This incident was related by PW5 (lines 14-15 at p. 55) to PW6 (lines 7-10 at p. 50 and lines 3-7 at p. 51 ROA) and PW7 (lines 9-15 at p. 56 and lines 1-2 at p. 57) and later to PW1 (lines 1-8 at p. 17) together with PW6 and PW7 the next day on 21 May 2009 when the incident was still fresh in her mind. It is highly improbable for the appellant on their initial encounter to have gone straight to requiring the victim to perform fellatio without knowing whether she will be subservient to the demands of the appellant. The sequence of molestation to know that she can be subdued followed by the fellatio would be the correct order since PW5 had corrected her testimony to confirm this.

[62] The court also notes that during the cross examination of the victim (PW5) on this episode for the 2nd charge the defence did not contradict or shake the evidence of PW5 (at p. 47 ROA) on the episode at all as to make it inherently improbable.

[63] Since there is evidence from the notes of proceedings of the offending act constituting the offence of the 2nd charge, this court will not upset the findings of the learned Sessions Judge to support the 2nd charge and finds that they are sufficient to support the conviction of the appellant on the 2nd charge.

Admission Of Inadmissible Evidence: Offence On Another Date

[64] Learned counsel for the appellant submitted that PW5 has testified that on 13 May 2009 the appellant had asked her to do the offending act (see p. 34 of the ROA), such evidence of another offense is not relevant to the 2nd charge as we are here to decide whether or not the appellant had committed the offending act on 20 May 2009, the date he was charged for the offence and contending that this admission of inadmissible evidence has seriously prejudiced and deprived him of a fair trial. The highly prejudicial and irrelevant evidence to the 2nd charge being inadmissible ought not to be introduced and/or recorded in the court proceedings below.

[65] The short answer to this is that the learned Sessions Judge had accepted the victim's account (see lines 6-17 of p. 169 ROA) that she was unable to give exact date and that the offending act for the s. 377B Code charge only occurred once (at lines 9-12 at p. 48 ROA) ie, on 20 May 2009 and not on 13 May 2009.

[66] There is no question from the evidence accepted by the learned Sessions Judge that there was only one offending act under s. 377B of the Code and not more taking place between the eight days period as learned counsel for the appellant is trying to make out. The date of 13 May 2009 being accepted as wrong, there is no second offending act under s. 337B of the Code admitted in evidence as to prejudice the fair trial of the appellant.

Treatment Of PW12's Evidence

[67] Learned counsel for the appellant submitted that PW12 was one of the teachers teaching in PW5's school (at lines 10 and 15-16 at p. 75 of ROA) in her examination-in-chief and cross-

examination that PW5 had told her that the appellant did not do the thing as alleged, the learned Sessions Judge had failed to direct himself on this evidence.

[68] The learned DPP submitted that the evidence of PW12 can be safely disregarded. PW12 testified that victim "told me that Cikgu Hanafi do not do the thing" (from line 10 p. 75 ROA). There is nothing to show in PW12's evidence that the word "thing" refer to specifically to the fact in issue ie: the offences committed in the KH Room. Furthermore there was nothing in PW12's evidence to show that PW12 asked the victim specifically whether the appellant had done the offending acts to her in the KH Room.

[69] Contrary to learned counsel of the appellant's submission, the learned Sessions Judge had considered the evidence of PW12 (at lines 8-16 p. 163 ROA and at lines 17-21 p. 172 ROA) and had concluded: "said that they knew about the matter when the police came for the investigation. There is not much weight could be given to these witnesses evidence."

[70] This is conclusion is correct because at re-examination, PW12 admitted (at lines 3-4 p. 76 ROA):

> I can't say (victim) is telling lies or Hanafi is wrong. I do not know the real situation.

[71] In addition what is significant to this court was that this denial of PW5 that the appellant "do not do the thing" as testified by PW12 was never put by the defence to PW5 for her to explain what PW5 meant.

[72] The court will accept under these circumstances that the learned Sessions Judge having directed his mind on this issue has the discretion as to whose evidence he would accept for coming to his decision in the case and that he had exercised his discretion correctly not to give weight to PW12's testimony.

Treatment Of DW2's Evidence

[73] Learned counsel for the appellant also submitted that the learned Sessions Judge failed to consider that the evidence of PW12 and DW2 corroborated each other that PW5 told her that the appellant did not do such things.

[74] On this the learned Sessions Judge had considered DW2's evidence (at lines 13-19 at p. 176 to lines 1-12 at p. 177) and had found (at lines 3-12 p. 182 ROA) that:

> The evidence seems to suggest that this witness have no knowledge at all about this case because he does not know that the accused was charged in court for the alleged offence. This court will not give any weight to this witness evidence.

[75] This court agrees with the finding of the learned Sessions Judge about the doubt as to the veracity of the DW2. DW2 does not act like a responsible guardian, his conduct in failing to take up the matter with the appellant and the school on knowing something has befallen his charge the victim (PW5), speaks volumes of his responsibility. Further, he was to have asked the victim (PW5) 3 times and yet can't remember when. The questioning of PW5 in the absence of his wife who also takes care of her also cast doubts on his evidence (see line 2 p. 112 ROA). In fact an adverse inference under s. 144(g) of the Evidence act 1950 should have been drawn on the defence for the failure to call DW2's wife to testify in view of PW5's relationship with her aunt (see line 5 of p. 39 ROA).

[76] Lastly, on finding out from PW5 that the thing never happened, he does nothing about this information then even though he is supposed to be friendly with the appellant.

When DW2 was asked in cross-examination (at lines 15-16 at p. 115 ROA):

> Q: Do you believe whatever (victim) have told you.
>
> A: I do not believe her.

[77] Lastly the evidence of DW2 on the questioning of PW5 was never put to PW5 in cross-examination and as such the learned Sessions Judge was right not to give any weight to the evidence of DW2.

Evidence Of PW6 And PW7: Hearsay And Contradiction

[78] Learned counsel for the appellant had submitted that the other prosecution's witnesses ie, PW6 and PW7 testified that they were informed by PW5 on 21 May 2009 that the appellant had asked her to commit the offending act on 20 May 2009, their evidence are undoubtedly hearsay in nature as they have also

admitted during cross-examination that they have no personal knowledge in the matter. PW6 and PW7's evidence contradicted PW5's evidence in respect of how many offending acts were done and as to the dates

[79] The court will consider reading the judgment (from pp. 155 to 158 ROA) that the learned Sessions Judge had used the evidence of PW6 and PW7 as corroboration to show the fact of the complaint to them on 21 May 2009 made by the victim of what the appellant had done to her on 13, 14 and 20 May 2009 at the KH Room and not to prove the truth of the complaint which was proven by PW5's own evidence.

[80] In respect of the conflict of dates 13 May 2009 or 20 May 2009 over the happening of the offending act for the 2nd charge, the learned Sessions Judge as earlier stated in this judgment had accepted that there was only one offending act and that happened on 20 May 2009. There is no contradiction contrary to learned counsel for the appellant's contention between the evidence of PW6 and PW7 with that of PW5 who had corrected her testimony that there was only one act and it happened on 20 May 2009 (see lines 1 to 11 p. 47 noting that line of cross examination was for incident on 20 May 2009 and at line 9 at p. 48 ROA).

Appellant's Evidence: Bare Denial

[81] The court agrees with the findings of the learned Sessions Judge on the treatment of the appellant's evidence as a bare denial and afterthought (at lines 13-14 of p. 180 ROA) in respect of a conspiracy of certain teachers and the children witnesses to frame him (at lines 14-21 of p. 182 and lines 12-20 p. 183 ROA).

Sufficiency And Treatment Of Evidence

[82] From the above findings the court will consider that here has been no admission of inadmissible evidence nor the exclusion of or failure to consider relevant evidence by the learned Sessions Judge. There was sufficient evidence for the learned Sessions Judge to make the findings that the defence had failed to raise a reasonable doubt of the prosecution's case and to find him guilty on all the 3 charges.

[83] The appellant has not made out any of the sub-grounds in his ground 2(a) of the petition and it fails.

Corroboration: PW5, PW8, PW9 And PW10 (Ground 2(b) Of Petition)

[84] The learned counsel for the appellant had submitted that the learned Sessions Judge had failed to direct his mind on the issue of corroboration, particularly, when the alleged victim PW5 was a child of tender age and the offences were sexual offences.

Corroboration: Warning

[85] The learned counsel for the appellant had submitted that it is a sound rule and generally accepted in practice not to act on uncorroborated evidence of a child, particularly, in sexual offences, the learned Sessions Judge in his judgment (at pp. 149 to 186 ROA), had failed to warn himself of the danger of convicting an accused person on the uncorroborated evidence of a child, and the warning must be expressly reflected in the judgment. (See Privy Council's decision in *Chiu Nang Hong v. PP* [1964] 1 LNS 24)

[86] With respect, a reading of the learned Sessions Judge's judgment (at pp. 167-168 ROA) in citing from the case of *Tajudin Salleh v. PP* [2008] 2 CLJ 745 (from para (e)) which is a s. 354 Code case, the learned Sessions Judge's was aware and had warned himself on acting on the uncorroborated evidence of a single child witness (from lines 1-8 p. 168 ROA):

> As a matter of strict law, the court can act on the uncorroborated testimony of a single child witness. **But it is a sound rule in practice not to act on the uncorroborated evidence of a child.** This is a rule of prudence and not of law. (emphasis added)

[87] Even though this extract is given in the context of the competency of the child witnesses, it must have been in the mind of the learned Sessions Judge that he is warning himself that he should not act on the uncorroborated evidence of the child witness. This should be sufficient to satisfy the requirements the *Chiu Nang Ho*'s case *(supra)*.

[88] This extract from the judgment showed that the learned Sessions Judge did apply what he cited as to the need for corroborative evidence (from lines 1-8 p. 168 ROA):

> This court finds that the gist of the victim evidence is corroborated in material particulars by the evidence of the witnesses in particular the child witnesses together with the evidence of PW1, PW6 and PW7.

Requirement For Corroboration

[89] Thomson LP in *Din v. Public Prosecutor* [1964] 1 LNS 33 said that the need for corroboration involving cases of sexual offences springs not from the nature of the witness but from the nature of the offence and added (at p. 301):

> If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.

[90] In *Balwant Singh v. PP* [1960] 1 LNS 10 it was held: "a witness cannot corroborate his own testimony and that independent evidence is required to constitute corroboration".

[91] Also, to the recent case of *Mohd Yusof Rahmat v. Pendakwaraya* [2009] 2 CLJ 673, where the Court of Appeal said at p. 680:

> … We must not forget that we are here dealing with the evidence of a child of tender years who is involved in an allegation of rape where even if she is an adult requires corroboration because a woman has a temptation to exaggerate an act of sexual connection, and for a child of tender years for his or her known aptitude to confuse fact with fantasy – see *Din v. PP* [1964] MLJ 300. We must distinguish between a statement that should be corroborated because of the nature of the offence eg, rape or corruption and that because the tender age of the witness. *The first requires corroboration because the honesty of the witness may be questionable. These offences are easy to allege but difficult to disprove. The second because of 1 the tender age of the witness who could be influenced by adults and his own imagination.* The evaluation of evidence in each of the categories must be distinguished. *Here in this instant case, we are faced with both the nature of the offence and tender age of the witness. Thus, the probative value of these corroborative evidence which were principally former statements by the victim is of little significance.* (emphasis added)

[92] Learned counsel for the appellant pointed out the appellant in the *Mohamad Yusof Rahmat*'s case *(supra)* was discharged and acquitted by the Court of Appeal on the ground as stated in headnote [1] that:

A

> … Without evidence of an independent nature to implicate the appellant to the crime other than what was claimed by the victim and repeated by her to various witnesses, the prosecution had failed to prove beyond reasonable doubt that it was the appellant who had raped the victim.

B *Evidence of Corroboration*

[93] Learned counsel for the appellant submitted that in the present case, there was complete absence of corroboration, in the sense; there is no independent corroboration to implicate the C appellant that he was the assailant. In other words, there is no corroborative evidence of a cogent and irresistible character which confirms in some materials particular not only the evidence that the crime has been committed but also that the appellant committed it.

D

[94] On the other hand, the learned DPP submitted that there was sufficient corroboration by PW1, PW8, PW9, PW10, PW6, PW7 and also PW11. In this case PW1 testified about complaint by the victim with regard to the sexual offences committed by the E appellant on the nights of 13 May 2009, 14 May 2009 and 20 May 2009 (pp. 16 & 17 of ROA).

[95] PW6 and PW7 also received the same complaint by the victim where the victim told PW6 of the incidents on the night of 13 May 2009, 14 May 2009 and 20 May 2009 (p. 72 of ROA).

F

[96] The learned DPP further submitted that all of the evidences above amounted to corroboration and cited the case of *PP v. Mardai* [1950] MLJ 33 where Spenser-Wilkinson J said at p. 33:

G

> … Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story. It would be H sufficient, in my view, if that corroboration consisted only of a subsequent complaint by the complainant herself provided that the statement implicated the accused and was made at the first reasonable opportunity after the commission of the offence.

I

[97] The learned DPP also submitted that any contradiction among the prosecution witnesses are not major since the complaint received by PW1, PW6, PW7 and PW11 from the

victim are consistent with regard to the main issue in this case ie: it was appellant who committed the five sexual offences on the victim in the KH Room.

"Corroboration" is defined in *Oxford Dictionary of Law* (5th edn):

"Evidence that confirms the accuracy of other evidence in a material particular."

[98] After reading the judgment (pp. 169-172) and perusing the notes of proceeding, the court finds the evidence given by PW5 was corroborated by the evidence of PW1, PW6, PW7, PW11, PW13 and her classmate witnesses. The learned Sessions Judge had indicated in his judgment (p. 157 of the ROA) that according to PW7 she had learned from a pupil, PW8 that when PW5 returned from the KH Room her shirt was inside out. PW5 had dared not make the complaint directly and had done this indirectly through Awa, Bob and her classmates (lines 14-16 p. 40 to lines 1-2 p. 41 ROA). This had triggered the meeting with PW1, PW6 and PW7 where PW5 complained of the three incidents with the appellant.

[99] The evidence of PW1, PW6 and PW7 are evidence of complaint immediately after the event of 20 May 2009 and are admissible under s. 8 (Illustration j) and s. 157 of the Evidence Act (See *Mohamad Yusof Rahmat*'s case *(supra)* at para. 18 of James Foong JCA's judgment). The same admissibility applies to the complaints she made to her classmates, PW8 (p. 63 ROA), PW9 (p. 66 ROA) and PW10 (p. 69 ROA) on what the appellant did to her in the KH Room.

[100] In respect of the case of the *Mohamad Yusof Rahmat*'s case *(supra)* it must be read in the context of the facts of that case which makes it distinguishable from this case. PW5 is ten years of age and is a sworn witness. The issue in *Mohamad Yusof Rahmat*'s case *(supra)* hinges on the unsatisfactory identification of the appellant as the rapist from the unsworn evidence of a five year old victim and the need for independent corroboration (as required by s. 133A Evidence Act 1950), like by an identification parade as required by case law. Her complaints to her grandparents and aunt were not sufficient corroborative evidence of identification. James Foong JCA (as he then was) had this to say:

A [19] Though such former statements by the victim in this case can be considered as corroborative evidence it is our judgment that the probative value assigned to them is far less than those of an independent nature … Thus, the probative value of these corroborative evidences which were principally former statements by the victim is of little significance.

B

[20] Having duly considered these corroborative evidences, it is our judgment that they are insufficient to support the victim's claim that she was indeed raped by the appellant. Though she repeatedly said that Ayah Su has raped her, the identification of the appellant as the person who committed the act only surfaced C on two occasions. The first was when she was shown a picture of the appellant she quickly covered her eyes with her hands. The other was when she was shown a picture of the appellant in the dock through a TV screen during the trial conducted by video link. *There was no physical identification of the appellant nor was there* D *an identification parade conducted soon after the arrest of the appellant, a procedure highly regarded as necessary* – see *Jaafar Ali v. PP* [1999] 1 CLJ 410 and *State of Maharashtra v. Suhkdeo Singh* [1992] CRI LJ 3545. Without evidence of an independent nature to implicate the appellant to the crime other than what was claimed by the E victim and repeated by her to various witnesses, we find that the prosecution has failed to prove beyond reasonable doubt that it was the appellant who raped the victim. (emphasis added)

[101] The court finds that the classmate child witnesses PW8 (10 years old), PW9 (11 years old) and PW10 (11 years old) who are F giving sworn evidence need not be corroborated as a matter of course, especially since they are not the complainant. These child witnesses are giving sworn evidence and they can corroborate each other's evidence and PW5's. However the warnings about child witnesses must be in the mind of the court when considering G what weight to be attached to their evidence. (See the cases of *Chiu Nang Hong*'s case and *Tajudin bin Salleh (supra)*). This warning as stated before was in the mind of the learned Sessions Judge and in his judgment.

H **[102]** The court finds that the learned Sessions Judge had accepted as corroborative evidence that PW5 had identified the camera used by the appellant (lines 19-21 p. 152 to lines 1-2 p. 153 ROA) and the evidence of PW8, PW9 and PW10 confirming that the victim (PW5) was asked by the appellant to I go to the KH Room (lines 19-21 p. 169 to lines 1-4 p. 170 ROA) and they saw her going to the KH Room (lines 2-7 p. 63, lines

3-8 and 12-16 p. 66, lines 6-13 p. 69). Though the recollections of these witnesses resulted in some contradictions more from error rather than because of deception (lines 6-11 p. 172 ROA), the learned Sessions Judge still managed to marshal sufficient consistency from the evidence to be used to corroborate PW5's evidence to support the three charges. All these findings by the learned Sessions Judge (from p. 168-172 ROA) can be considered as independent corroborating evidence to be added on top of evidence on the complaint as elaborated before to sustain the finding that the PW5's evidence has been sufficiently corroborated in respect of the committal of all the offences in the three charges by the appellant.

Sufficiency Of Corroboration

[103] From the above findings the court will consider that the learned Sessions Judge had not erred in accepting the sworn evidence of PW8, PW9 and PW10 to be used in independent corroboration of the sworn evidence of PW5. This added to the other independent corroboration from the evidence on the complaint of PW6, PW7 and PW10 boosts the weight of the corroborative evidence for the learned Sessions Judge to make the findings that the defence had failed to raise a reasonable doubt of the prosecution's case and to find him guilty on all the three charges.

[104] The appellant has not made out any of the sub-grounds in his ground 2(b) of the petition and it fails.

No Nude Photographs Of PW5 (Ground 2(c) Of The Petition)

[105] Learned counsel for the appellant had submitted that the failure to find the naked photographs of the victim stored in the memory of the appellant's camera resulted in prosecution not proving the 3rd charge.

[106] The appellant further submitted that all the items seized from the appellant such as the appellant's camera, laptop computer and mobile phones also did not show that there was naked photograph stored in their respective memory (see p. 92 of the ROA).

[107] PW5 had given evidence at pp. 33 to 35 of the ROA that on 13 May 2009 & 14 May 2009 during the night classes, she was asked by the appellant to strip naked in the KH Room and was photographed in the nude. PW5 had testified affirmatively that the camera used by the appellant was black and white in colour (lines 11 and 13 p. 35 of the ROA) and identified the camera through a photograph (ID3) (lines 3-5 at p. 36 of the ROA).

[108] The investigating officer PW15 had testified that the appellant's camera was seized and sent to the PDRM Forensic Laboratory at Cheras, Selangor for analysis and the result was that there was no naked photograph stored in the memory of the appellant's camera (lines 5-7 at p. 92 of the ROA).

[109] The learned DPP submitted that even if the forensic report was negative, it will not destroy the 3rd charge against the appellant for the offence under s. 509 of the Code. The learned DPP further submitted that the forensic report is not a mandatory requirement to prove the appellant had taken victim's naked photograph. It is only a weight to be attached and the negative report of it will not be fatal to the case. What is important is the evidence of the victim as she was the one who experienced the insulting outrages on the night of 13 May 2009 and 14 May 2009.

[110] The court is of the opinion that the learned Sessions Judge correctly concluded:

> This court considered that there was no photograph of the victim naked tendered but this court is of the opinion that the availability of the photography is not the ingredient of the charge s. 509 of the Penal Code. The ingredients of the offence are that the accused intrudes upon the victim privacy with intent to insult her modesty. The act of intrusion was that the accused ask the victim to remove her clothes for the accused to take photograph of her naked.

[111] The court agrees with the learned appellant counsel that, if at all relevant, the missing photographs would be good corroborative evidence of PW5's charge against the appellant. However since the learned Sessions Judge had found sufficient evidence before him to find the appellant guilty of the 3rd charge,

the failure to find the naked photographs is not fatal to the prosecution's case against the appellant. Therefore, the appellant's ground 2(c) of the petition fails.

Grounds Against Conviction

[112] In the case of *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, the Court of Appeal had stated:

> Unlike civil appeal, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe.

[113] This court having considered the submissions of learned counsel for the appellant and DPP on the grounds of appeal against conviction advanced by the appellant finds that none of the grounds can be sustained and that the conviction of the appellant by the learned Sessions Judge was safe and should be upheld.

Grounds Of Appeal Against Sentencing

[114] Learned counsel for the appellant submitted that the sentence of five years' imprisonment with three (3) whipping under the 2nd charge is manifestly excessive as the learned Sessions Judge appeared to have given too much emphasis on the public interest when passing the sentence and there was no need at all for the learned Sessions Judge to impose a whipping sentence under the 2nd charge as the appellant is not a persistent offender.

[115] Learned DPP had submitted that the sentence passed by the learned Sessions Judge is not excessive. There was nothing wrong in fact and in law to take into consideration public interest as the main consideration.

[116] On this the court will refer to the case of *PP v. Tanga Muthu* [1939] FMSLR 166 where Poyser J had held:

> In the case of assault with intent to outrage the modesty and other sexual offences against children, the imposition of a fine only is not an adequate punishment and the appropriate sentence should be one of rigorous imprisonment.

[117] In *Ong Lai Kim & Ors v. PP* [1991] 2 CLJ 1568; [1991] 3 CLJ (Rep) 376 what Zakaria Yatim J stated in respect of rape which this court opines is just as applicable to outraging and molestation charges:

> The offence of rape is rampant in this country. The Court will be failing in its duty if it does not impose a deterrent sentence in this case. The punishment must not only deter the appellants from committing a similar offence in the future but it must also deter others from committing such an offence. The punishment inflicted for grave offences including the crime of rape should adequately reflect the revulsion felt by the great majority of society. See *JC Smith & B Hogan Criminal Law* (5th Ed) at p. 6.
>
> In this case therefore the punishment has to be sufficiently harsh and proportionate to the harm done, otherwise society will feel that the punishment is manifestly inadequate. The punishment must also reflect public disapproval of the crime committed by the appellant. See *R v. Roberts* [1982] 1 All ER 609 at pg 610.

[118] The role of a appellate court in reviewing a sentence on appeal was considered in the case of *Chia Kim Heng Frederick v. PP* [1992] 1 SLR 361, where Yong Pung How, CJ on the sentencing on rape charge had this to say at pp. 367F-368E:

> The court should then consider in turn the mitigating factors which merit a reduction of the sentence, of which a guilty plea which saves the victim from further embarrassment and suffering will be an important consideration and will merit a reduction of one-quarter to one-third of the sentence; and whether there were other factors *such as the victim's youth or the accused person's position of responsibility and trust towards her, or perversions or gross indignities have been forced on the victim, which justify a longer sentence.* (emphasis added)

[119] The learned judge went further to state:

> The role of the Court of Criminal Appeal as an appellate court when considering an appeal as to the sentence imposed by the trial court has been re-stated recently in *Tan Koon Swan v. PP*. The court can and will interfere if it is satisfied that (a) the sentencing judge has made a wrong decision as to a proper factual basis for sentence; (b) there has been an error on the part of the trial judge in appreciating the material placed before him; (c) the sentence was wrong in principle; and (d) the sentence imposed was manifestly excessive.

[120] Lastly Hashim Yeop Sani J (as he then was) in *PP v. Loo Choon Fatt* [1976] 1 LNS 102 had reiterated: 'It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence'.

[121] Looking at the facts before the learned Sessions Judge and his conclusions in his judgement (at pp. 185 to 186 of the ROA), the court can find no errors of law or facts, or that a wrong principle has been applied or omitted or that the sentence was manifestly excessive in respect of the facts of the case of a perverted teacher preying on his charge who is a child to justify this court to interfere with the sentence handed down by the Sessions Court. The court is of the view that the prevalence of such teacher/student outraging and molestation cases justifies an even harsher sentence. The appeal against sentence is dismissed.

Conclusion

[122] The appellant's appeal against conviction and sentence is dismissed.